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LEGAL PROFITS OF EFFICIENCY.

In a preceding article in this magazine, the labor and value concepts of profit were selected as the most important theories of the entrepreneur's income in the fields of both law and economics. The first explains profit as primarily a return for effort, exertion or labor on the part of the entrepeneur. This is above all an efficiency or labor theory. The second traces the origin of profit solely to certain dynamic changes in modern industry, and is clearly a scarcity or pure value theory. These two concepts represent, then, wholly unlike incomes. The first is an earned return; the second is plainly unearned. The state should continue to encourage the growth of the first; it should eliminate as far as possible the second. The legal competitive principle of the common law served to reduce unearned gains; but the plane of competition is fast losing its hold in modern decisions, and what was bold exploitation in former times may have become legitimate production of to-day. That the permanent position of efficiency profits in the common law may be emphasized in relation to the uncertain scarcity surpluses and that the function of the legal competitive principle in reducing unearned increments may be duly stressed, it seems best to examine with care the actual efficiency returns of the entrepreneur in the industrial world.

All returns of productive effort or exertion on the part of the entrepreneur may be classed as different rewards of efficiency; and the profits from this efficiency arise wholly in reducing the costs or sacrifices of production. In another place, such rewards have been classified by the present writer as positive and negative utility profits.[1] Positive utility profits appear in the creation of

[1]American Economic Review June, 1918.

added utilities through an increase in the positive forces of production. This utility may be measured—according to the nature of the entrepreneur's sacrifice—by an increment added to the output or by one taken from the total outlay which was not previously made for protective purposes. Negative utility profits, on the other hand, are due mainly to the entrepreneur's success in the protection of his product from certain negative elements which tend to reduce the total output. For example, all protective measures used for the preservation of the physical properties of the output or of the process itself tend to yield negative utility profits.

A proper treatment of the numerous forms of legal efficiency incomes, as we would differentiate them, should be introduced by a definite plan of profit analysis; and it will serve our purpose sufficiently well if at this point a tentative classification of the efficiency surplus is presented with due regard for its various subheads:

Efficiency profits which constitute a true earned surplus.

A. Positive returns
   I. Utility profits.
   II. Wages of management.

B. Negative returns
   III. Subjective risk profits.
   IV. Internal risk profits.
   V. External risk profits.

A strong contrast may be drawn here between positive utility, and negative utility returns. Positive utility profits have their origin in the production of added salable commodities at the prevailing price, while a large part of negative utility profits is the result of merely preserving or redeeming such utilities from threatened loss or disuse. In the first place, the entrepreneur may, of course, reduce the costs of production or enlarge the capacity of the technical processes and finally the output of an industry. His efforts result largely in a relative increase of desirable utilities, mainly through an increase in the creative or positive forces of production. In any successful undertaking, these forces augment, then, the concrete utilities and the residual surplus of the entrepreneur; and that part of the output which is thereby added is, therefore, described as the positive returns of utility.

These are divided here into two subclasses. The simple profits of utility, which come first in our analysis, accrue from certain

dynamic changes in industry which may be traced directly to the inventive capacity and the coordinating powers of the entrepreneur. Wages of management, noted here as the second subclass, are usually derived from the positive returns of utility; and these arise in turn from efficient methods of directing or controlling the routine conduct of an industry. For example, the manager of an irrigation plant may succeed in augmenting positive utility returns by bringing new areas under cultivation; but as a means of protecting a fire-stricken section, this same plant may yield only negative utility profits. In the latter case, wages of management are also derived finally from the positive profits of utility which have been saved from destruction. Clearly enough, positive profits of utility constitute a much desired key to any careful analysis of efficiency profits.

On the other hand, the entrepreneur may be content to add to an established process only those services which reduce subjective, technical and market risks, and thus serve merely to preserve the present elements of production and the normal output of an enterprise. Obviously, such measures ward off injurious forces and give rise to three forms of negative returns.

Subjective risk profits, which form the first subclass, are due to the elimination of anxiety or any mental stress arising from the risk-taking function of the entrepreneur. After long tests, many enterprises are found to be practically worthless commercially, bringing naught but anxiety and loss to the entrepreneur. If in the course of time, however, a process is firmly established, this mental strain gradually disappears, though some risk losses still continue. In general if risk losses are fully recognized, the mental stress of fear and anxiety tends to limit supply until prices rise ultimately to the necessary cost level. Now it is to be noted that as the more efficient entrepreneurs reduce their risk losses and the accompanying worry and anxiety, they secure two forms of subjective risk profits. There is, first of all, a gain from the increment necessary to compensate producers generally for undergoing the mental stress concomitant with risk. Consequently, by reducing in a single enterprise such industrial hazards and the accompanying mental strain, the usual or common compensation for the latter becomes in this case a profit of efficiency. This is the first form of subjective risk profit. Finally, his second gain from this source is due to a saving in time, energy, and improvements made possible by the elimination of mental stress in partic-

ular enterprises. In other words, risk losses and mental strain decrease simultaneously for the more efficient entrepreneur; while costs, as well as the losses and the mental burden, increase for the less skillful producer, and form a substantial cause for the failure of the marginal entrepreneur.

The second group of negative returns, which are designated here as internal risk profits, comes from reducing the losses of certain internal economies of production. All protective measures used for the preservation of the physical properties of the output or the technical process itself are to be counted as internal economies, and this particular group of negative utility profits arises from efforts which preserve the concrete product and prevent its destruction or deterioration. Thus thick walls preserve the ice contained in the refrigerator car; and the ice in turn preserves the fruit or meat placed therein. Orchards in Colorado are often smudged to prevent frequent losses from heavy frosts. In like manner farm and mine owners are called upon to protect the elements of the earth. It is plain that a fisherman, who is able by a new device to prevent the total destruction of large quantities of fish, is thereby adding a considerable sum to his profits. Again, efforts have recently been made to protect crops from the ravages of insects and stock from sudden epidemic. The outlays required in such measures as spraying grain stored in elevators or the dipping of cattle to kill insect pests are to be counted as sacrifices of production. In fact, these constitute a form of risk costs which overcome losses and therefore yield a risk profit. All outlays of this nature eliminate a negative force; and are obviously to be separated by careful analysis from those costs which increase the positive forces of production.

The third class of negative utility gains are external risk profits. These are obtained by overcoming losses in the external economies of production. That is to say, measures taken to prevent the fluctuation of money costs in outlays or to secure a permanent market for finished goods generally decrease risk losses. It will thus be seen that external risk profits are of two distinct kinds, and that they depend directly upon overcoming the speculative elements in purchasing the factors of production and in selling the finished product. In many instances such losses are reduced by annual contracts which fix wages; by the importation of new laborers; by the purchase or lease of mineral, timbered, and ranch lands to secure raw products; and by establishing or purchasing enterprises supplying needed materials.

Obviously, such measures as we have described here ward off injurious forces, are preventive rather than constructive, tend to keep an enterprise from falling below the productive margin, serve to preserve concrete utilities, and consequently yield the entrepreneur different forms of negative utility gains. These various forms of concrete utility profits, protected as they are by the common law of the land, require careful and critical examination.

In this article our interest is centered mainly in the different forms of legal efficiency profits. Many instances may be selected in which scarcity returns are practically absent; and, indeed, a great variety of legal decisions affords us large opportunity of studying efficiency profits in detail. Throughout a long line of legal opinions runs the constant effort to restore to the injured person the thing for which he has bargained, to enforce the performance of contracts, or to render damages in return for the utility or economic good of which he has been deprived. These principles of compulsory co-operative effort governing a large group of modern cases, and especially the rule which excludes uncertain or contingent profits as a measure of damages furnishes for the investigator a wide field for the study of various forms of efficiency profits. Thus in any suit for damages arising from injury to one's business, it is usually stated by the court that the plaintiff should be allowed compensation for the *losses sustained* and the *gains prevented.* Clearly enough these are technical terms which distinguish between losses sustained in whole or part from the entrepreneur's expenditures, on the one side, and gains prevented because of his failure to secure a definite profit on the other. But though the meaning of each of these terms is fixed and definite, they do not include the contingent and uncertain gains of the market. Even earned gains, which are still expectant rewards and subject to the fluctuation of market prices, are seldom included in the measure of damages. Whether such contingent profits are earned or unearned, they are excluded by the court from the evidence submitted to the jury; and it is clear that the constant evolution in the legal theory of damages is steadily compelling men to co-operate actively in furthering the means of production and the accumulation of efficiency returns. The fruit of every man's effort is thus, in one sense, guaranteed to him by the law of the land; and such profits of efficiency may be studied in relation to the legal remedies by which they are preserved.

I. Utility profit, then, as we have termed it, is the first form of efficiency return. That the entrepreneur shall rest secure in the rightful enjoyment of his output and the legitimate means of production is a well-established principle of the law. From ancient times this right has been constantly guarded by legal remedies.[2] It is therefore necessary to emphasize the important place which utility profits occupy in the socio-legal process. In fact, these profits form the keystone of all co-operative production; for to create value in use is the main object of the entrepreneur's function and of his co-operative efforts in the technical field. Moreover, upon the previous existence of positive utility profits depends the other forms of efficiency returns. We have, therefore, selected examples of utility profits from leading decisions in which this obligation to co-operate in the productive process is shown entirely independent of exchange value.

Thus, litigation arising between the owners of water rights illustrates simply a struggle for positive utility profits or the use value of the same stream. The right to the use of water pertains to the ownership of the land through which the stream naturally flows, and it is vested alike in every owner of the soil. If one person, by wrongfully diverting water from its course, works injury to another, he renders himself liable to some form of legal or equitable remedy, depending largely upon the nature of the case. Chancellor Kent has put this fact in a very concise form in his well-known Commentaries:

> "All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor."[3]

[2]But in more modern decisions the idea of an earned or utility profit has been somewhat obscured by the recent evolution of contractual rights. Strangely enough, utility profits, which form an exact measure of the entrepreneur's effort, have, by virtue of this change, often become embodied in the larger and more complex "earnings" of the business. That is, the legal labor theory of utility profits and the "earnings" of the employer have been gradually overshadowed by the greater "earnings" of capital. But this is simply one result of the contractual amalgamation of the productive forces in social process.

[3]3 Kent, Comm., 440; See also Merritt *vs.* Brinkerhoff (1820) 17 Johns. 306; Tyler *vs.* Wilkinson (1827) 24 Fed. Cas. No. 14,312; Pollitt *vs.* Long (1870) 58 Barb. 34.

In a particular instance in New York, the defendant had unreasonably obstructed the flow of a stream and deliberately deprived the complainants of the use of their factory during several working hours of each day. The latter were not allowed to recover prospective money profits as damages, but they were entitled to the use value or utility of the water which had been withheld.

> "The true measure of damages in a case like this", said the court," is the value of the use of the water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it."[4]

Obviously, these excerpts contain a legal guaranty of compulsory co-operative effort among enterpreneurs on the same stream. It is abundantly plain that by unduly withholding water from other users, one person might decrease their utility profits; by suddenly flooding the stream he might increase their technical or internal risk losses. This form of legal compulsory co-operation tends, therefore, to give to each user of water the full benefit of his utility profits.

II. Wages of management or the earnings of the entrepreneur come second in our plan of analysis. Historically considered, the tendency to include profits within the rule of damages has crept into American law by degrees. This principle was undoubtedly first applied in early cases to the earnings of the laborer and the professional man, for the value of their services was estimated as profits. Somewhat later the rule was extended to the personal earnings of the entrepreneur, that it, the wages of superintendence and management. At the present time, however, these co-operative surpluses are considered as arising directly from the economic efforts of the entrepreneur in a gradually ascending scale from wages of management to the more or less certain earnings of an entire business. And there is now a well-established rule of law which allows him to recover compensation for injury to his personal powers of production or to the factors which he would have used in his business. In fine, the entrepreneur's personal effort becomes, then, the primary cause and measure of all efficiency profits.

Most noteworthy is the fact that in certain states wages of management have been constantly distinguished from the gains upon capital or the fluctuating surpluses of a commercial venture. Indeed, this policy of confining the rewards of personal manage-

[4]Pollitt *vs.* Long (1870) *supra,* footnote 3, at p. 36.

ment strictly to the earnings of the producer is of great significance. It has served to segregate these rewards from the more contingent surpluses, and the judges here have given us a remarkable series of legal data which include such earnings under the rule of personal damages. In this respect, the courts of no state have made more important additions to this modern theory than those of New York; they have at least plainly differentiated the economic results of this personal element in industry from the purely technical output and the speculative surpluses of capital. For example, in 1874 one member of a firm testified that he was engaged in the business of importing tea, that this part of the enterprise required great skill, and that as the consequence of an injury to himself his earnings had rapidly declined;[5] and in a later case in the same state, the plaintiff, who was engaged in the sale of dry-goods, claimed that because of a personal injury his profits had rapidly decreased.[6] But in neither of these instances did the court allow past profits upon capital to be taken as a measure of the earnings of the plaintiff. Nor is any intimation given that proof of the existence of past profits may be made to enable the jury to estimate what the future gains might be.

In this relation, moreover, the decisions of several states have been quite uniformly against the recognition of profits on capital. We may select, for example, an opinion of the Supreme Court of Michigan rendered in 1893. It was declared that the loss of profits in conducting an enterprise involving the labor of others is not considered to be a necessary consequence of personal injury to the plaintiff. The extent of one's recovery upon this ground would, in brief, be determined by what his services were worth in the conduct of the business in which he was engaged.[7] In the more recent suit of *Kronold* v. *City of New York*,[8] the court cited from a large number of decisions which rejected profits in making up the rule of damages for personal injury. These opinions were said, indeed, to be "all based upon facts which disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from returns", upon merely invested capital. Also, a year later, a court of this state excluded the profits of a lunch business for the same

[5]Masterson *vs.* Village of Mount Vernon (1874) 58 N. Y. 391, 395.
[6]Lincoln *vs.* Saratoga, *etc.*, R. R. (1840) 23 Wend. 425.
[7]Silsby *vs.* Michigan Car Co. (1893) 95 Mich. 204, 209; 54 N. W. 761.
[8](1906) 186 N. Y. 44, 45, 78 N. E. 572.

reason. As a matter of fact, it was conceded that the business did not require a large capital or employ more than three men; but the issue in the case was said to involve expressly the total profits of a business and not merely the value of the entrepreneur's personal services.[9] Such profits were, therefore, not included in personal earnings. A like distinction is made by the courts of Pennsylvania. The net gain of an enterprise is said to depend largely upon other circumstances than the earning capacity of the person managing the business. The location of the town, the character of the business, the degree of competition, and the prosperity of the community are all to be considered as affecting profits.[10] Yet *per contra,* the profits of a real estate business have been taken as a measure of personal damages in this same state.[11] Strangely enough the court here seems to have followed a previous decision[12] in which the plaintiff—a peddler, was allowed to prove that his annual sales tended to show the returns that he might have earned had he been able to attend properly to his business.

> "We apprehend", said the court, "that the profits arising from a legitimate land business are not less certain than those arising from the business of peddling, nor more difficult to estimate."

In well-established businesses, moreover, it is apparent that the courts are inclined to construe this principle less strictly. The injured person is permitted to recover as compensation whatever profits it is reasonably certain he would otherwise have realized. A most illuminating, as well as a somewhat extreme, opinion is given in a case of Illinois.

> "We all know", declared the judge in giving this decision, "that in many, if not all, professions and callings, years of effort, skill and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another?" "And of what does this loss consist," continued the court, "but the profits that would have been made had the act not been performed by appellants?

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[9]Weir *vs.* Union R. R. (1907) 188 N. Y. 416, 419; 81 N. E. 1178.

[10]Goodhart *vs.* Pennsylvania R. R. (1896) 177 Pa. 1, 15, 16, 35 Atl. 191.

[11]Pennsylvania R. R. *vs.* Dale (1874) 76 Pa. 47, 49.

[12]Hanover R. R. *vs.* Coyle (1867) 55 Pa. 396.

> And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, they would have been less?"[13]

This opinion shows a marked divergence from those just considered. It referred particularly to a planing mill, the profits of which obviously arose, not so much from the personal earnings of the entrepreneur, as from the necessary use of machinery. In this respect, it is largely antagonistic to the spirit of the decisions of Michigan and New York.

III. Subjective risk profits. There seems to be little room in law for the collection of a subjective risk profit. Mental anguish arising from an injury to property has often been held not to be a subject of damages. This is undoubtedly the rule of many early cases. That is, unless the mental suffering resulted in connection with some personal physical injury it did not form a measure of compensation. Doubtless to become a basis of damages mental injury must be accompanied by definite and recognized physical effects. Nevertheless, a considerable collection of cases might be made in which successful actions were maintained to recover damages for mental stress in relation to the technical processes of production. Such decisions seem to furnish important exceptions to the preceding rule. Stated concisely, when the mental anguish is the natural and direct result of an injury to property or a breach of contract, compensation has not seldom been allowed for it. Now any injury to the productive process affects in most instances the accompanying risks and the corresponding worry over losses. Obviously, this interference may affect appreciably the entrepreneur's person, or the labor, land, and capital employed. On the other hand, if he learns to bear risks with fortitude, his mental suffering is decreased, his time and efforts yield greater rewards, and his subjective risk profits become efficiency returns.

A number of decisions which verify this view may be selected: Thus when a person was injured by the defendants through an illegal boycott, he was allowed to collect damages for his mental suffering.[14] In another instance the defendant had maliciously in-

[13]Chapman *vs.* Kirby (1868) 49 Ill. 213, 219.

[14]Carter *vs.* Oster (1908) 134 Mo. App. 146; 112 S. W. 995.

jured the horse of the plaintiff. It was held that the latter could recover damages for his injured feelings.[15] Practically the same decision was reached in Missouri in a case in which the defendant had wrongfully chastised the plaintiff's slave.[16] Also, in the subject of contracts, the more recent cases go far toward establishing the rule that when a breach of contract naturally involves mental suffering, compensation may be allowed for the pain. The Supreme Court of Tennessee has explained that

> "Where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach."[17]

In harmony with this view, damages for mental suffering have been allowed by the courts when the plaintiff was wrongfuliy turned out of his leased house[18] or was expelled from a well-known amusement hall by the lessee[19] and when the defendant failed to furnish a trousseau for a certain bride[20] or to provide a proper furnace for a particular house.[21]

IV. Internal risk profits. The term "losses sustained" refers, as we have previously explained, to a measurable loss in the productive process. The injury inflicted falls upon the concrete services of labor, land or capital, and finally upon the finished output. The courts endeavor by means of the rule governing the rendering of damages to restore an enterprise to the condition in which it existed before the injury occurred. The transgressor, in other words, is made responsible for the internal risk losses which he has occasioned; and by this course the courts have overcome certain risk losses, restored the corresponding risk profits of the entrepreneur, and guaranteed to him the product of his own effort. It is therefore possible to take up through the rule of damages the legal method of measuring negative utility profits derived respectively from labor, land and capital.

(a) Internal risk profits on labor. The rule of damages

[15]Kimball *vs.* Holmes (1880) 60 N. H. 163, 164.

[16]West *vs.* Forest (1856) 22 Mo. 344.

[17]Wadsforth *vs.* Western Union Tel. Co. (1888) 86 Tenn. 695, 703; 8 S. W. 574.

[18]Moyer *vs.* Gordon (1887) 113 Ind. 282; 14 N. E. 476.

[19]Smith *vs.* Leo (1895) 92 Hun, 242, 243; 36 N. Y. Supp. 949.

[20]Lewis *vs.* Holmes (1903) 109 La. 1030; 34 So. 66.

[21]Vogel *vs.* McAuliffe (1895) 18 R. I. 791; 31 Atl. 1.

secures to every employer the use value of his hired laborers. For example, a contractor by using dynamite in the vicinity of the plaintiff's factory, drove the latter's workmen temporarily from the building in which they were employed. It was held that the owner of the factory might recover the value of the workmen's time so lost. That is, the use value of each laborer was taken as a measure of damages. It was explained in this decision that

> "The measure of damages would be the value to the plaintiffs of the work which the defendant's negligence prevented from being done."[22]

A right to the prospective use value of all laborers employed in any particular enterprise is shown in cases in which the workmen of one employer are enticed away by another. Thus, the act of inducing servants to leave the service of their master seems from an early period to have been held a serious wrong in English law. Blackstone condemns the peculiar grievance in no uncertain language.[23] In a leading English case, the injury complained of was perpetrated by persons who had invited the entrepreneur's laborers to dinner and had then induced them to leave his employ. It was claimed by the latter that through this act, he had lost the profits for two years upon the manufacture of his pianos. As often happens, the laborers in this instance worked by the piece and were not hired for any definite period. Wages were not, however, taken as the measure of damages; but on the contrary, the prospective profits upon the final product for two years were accepted as the standard of compensation. Indeed, such profits were not looked upon by the court as too remote or uncertain. Under this ruling, it is plain that the use value, not only of labor but of all the factors used in production, was indicated by the profits to be obtained.[24] But after all, this final standard can only be used when it is regarded by the courts as reasonably certain. Thus the decision was otherwise when the profits were expected from a singer's somewhat uncertain performance. Returns in this last instance were not sufficiently definite to be recovered by the lessee of an opera house who had been deprived of its use.[25] Moreover, the injury suffered by a well-known singer

[22]Hunter *vs.* Farren (1879) 127 Mass. 481, 484.

[23]3 Comm. 143.

[24]Gunter *vs.* Astor (1819) 4 Moore 12.

[25]New York Academy of Music *vs.* Hackett (1858 N. Y.) 2 Hilt. 217.

from the low temperature of an unfinished opera house and damages claimed were of necessity purely speculative and conjectural.[26] Also, in *Smith* v. *Goodman*[27] certain laborers had been imported by the plaintiffs into Georgia expressly for the purpose of using them on a turpentine farm. After working about three days, they were induced to enter the employment of another person; and the latter willfully retained them during the period for which they had previously been hired. The circumstances attending the infliction of the injury were of a very aggravating nature, for the plaintiffs had been put to considerable expense and trouble in obtaining the workmen.

> "They proved their loss", said the court, "by showing what would have been the net profits of each of these laborers, and what they had lost by the failure to improve their property in consequence of the decoying and retaining of these servants by the defendant and his coadjutors."

(b) Internal risk profits on land or natural agents. The entrepreneur is also entitled to the use value of the natural agents which he employs in any thoroughly established process of production. The jury is allowed, however, to use considerable discretion in arriving at the value of this use. Whether profits are allowed as damages depends somewhat upon the nature of the business affected by the injury. Profits have been found sufficiently reliable to be made a measure of damages in agriculture, grazing, and some forms of mining. But on the other hand, where land is used mostly for commercial purposes or as a means of obtaining mineral wealth, the courts have shown a marked reluctance in permitting profits to be made a final rule of compensation for injury to property.

Of the various uses to which land is devoted, profits seem to be regarded as most reliable in agricultural pursuits. By way of illustration, a railroad company in Oregon raised an embankment which cut off a farmer's access to the river on which he had long carried his products to market. The supreme court held that the company became liable to him for the exact profits of which he had been deprived.[28] In another decision it was explained that in general if the owner of land is wrongfully prevented from oc-

[26] *Ibid,* pp. 222, 223.

[27] (1886) 75 Ga. 198, 201, 202.

[28] Willer *vs.* Oregon Ry. (1887) 15 Ore. 152, 156; 13 Pac. 768.

cupying it, the measure of his damages is the value of the use of the land,—that is, its rental value. In that case the plaintiff's farming land was wrongfully overflowed before crops had been planted on it; the measure of damages was held to be the fair rental value of the ground but not of the value of the crops that might have been raised on it.[29] The court was careful here to exclude the value of the future product which might have been obtained from the land. The value of growing crops, however, has in many cases been given to the jury in making up a just compensation for damages incurred. Certain it is, that the value of agricultural products, even of those not yet matured, seems to have gained a permanent foothold in the legal rule of damages.[30] But it is to be noted that as we enter the commercial field, this rule becomes more variable. In two specific cases access to a person's land was effectually obstructed, but he could not legally recover the profits that he might have made by selling clay from it[31] or by disposing of the land itself.[32]

However in certain states the important place which land occupies in fixing the measure of damages is seen in its use even for commercial purposes. In Indiana one person leased from another a candy stand at a county fair on condition that no competitors were to be allowed within certain limits. The lessor broke his contract by leasing a part of the premises to another enterprise. It was decided that the prospective profits which might have been made in this instance but for the presence of competition, were too uncertain. However, the measure of damages finally accepted by the court was the difference between the rented value of the premises with and without the rival stands.[33] But it will be found upon reflection that as the rental value of building sites depends especially upon the social demand for them, here strangely enough, the use value is made to vary directly with a fluctuating demand and depends, therefore, in a peculiar manner upon the money income of a business. That is to say, in the case of personal effort, as we have seen, wages are used only as a

[29]City of Chicago *vs.* Huenerbein (1877) 85 Ill. 594; See Baldwin *vs.* Calkins (1833) 10 Wend. 169, 175, 179.

[30]The Chicago *vs.* Ward (1855) 16 Ill. 522; Drake *vs.* The Chicago etc. Ry. (1884) 63 Iowa 302, 310; 19 N. W. 215; Easterbook *vs.* Erie Ry. (1865) 51 Barb. 94; Chase *vs.* New York Central R. R. (1857) 24 Barb. 274, 275.

[31]Garritee *vs.* City of Baltimore (1879) 53 Md. 422.

[32]San Antonio *vs.* Mullaly (1895) 11 Tex. Civ. App. 596, 599.

[33]Montgomery County Union Agricultural Society *vs.* Harwood (1891) 126 Ind. 440; 26 N. E. 182.

means of determining the rule of compensation; but the unearned rental value of land, on the other hand, seems to be taken as an exact measure of damages. There is some deviation from this rule, however. In a second instance, the defendant had so obstructed a river that the injured person had lost considerable patronage at his hotel which was situated on the bank of the stream. This form of business borders, of course, on the commercial field; consequently, the court found that the proprietor could recover compensation for the damage which he had suffered in the loss of business profits.[34] And it is more than probable here that the proprietor's total profits exceeded somewhat the rental value of his property.

In like manner the use value or profit is taken as the measure of injury to other forms of natural agents. For example, the tollage or reasonable value of a stream for floating logs may be recovered as compensation from a person who has obstructed it.[35] In another instance, the plaintiff's loss by the diversion of water from both his mill and farm amounted to over one hundred dollars a year, which was allowed as the measure of damages by the jury in the case.[36] In Rhode Island the water wheel of a cotton mill was impeded by the overflow of water from the erection of a dam farther down the same stream. In assessing the plaintiff's damages, he was allowed

> "to show the additional quantity of goods which the mill was capable of making, and probably would have made, had the wheel been unobstructed by the dam, the value of those goods when made, the cost of making, and the prices which such goods brought in the market, during the time; thus showing the general profit of the business which the plaintiff carried on."[37]

Similar damages were collected for the pollution of a pond. This act had destroyed the ice supply of a well-established business.[38] Of the same character were other decisions which allowed com-

[34]French *vs.* Connecticut River Lumber Co. (1887) 145 Mass. 261; 14 N. E. 113.

[35]DeCamp *vs.* Bullard (1899) 159 N. Y. 450, 452, 455; 54 N. E. 26.

[36]Washington County Water Co. *vs.* Garver (1896) 91 Md. 398; 46 Atl. 979.

[37]Simmons *vs.* Brown and Wife (1858) 5 R. I. 299, 301, 302; See also Gibson and Kloppenstein *vs.* Fischer and Orton (1885) 68 Iowa 29; 25 N. W. 914.

[38]Lawton *vs.* Herrick (1910) 83 Conn. 417; 76 Atl. 986.

pensation for the carrying away of ice from various mill ponds.[39] Thus, in the state of Connecticut such ice belongs to the owner of any overflowed land, subject to the right of the mill owner if it be necessary to maintain a proper supply of water for his mill.[40] Where a mill dam in Massachusetts was destroyed, damages were assessed for the cost of repairing the dam, and also for the interruption of the use of the mill and the diminution of profits by diversion of the water.[41] Again, this use value, or its measure in the form of profit, has been allowed as damages for withholding the water of a stream rightfully used in running a mill.[42] Likewise, where the defendant by means of an injunction maliciously prevented the plaintiff from using his own coal lands for a year, it was held that, not only the nature and extent of the coal beds, but also the profit on possible sales of coal might be shown,

> "not in order to be allowed by the jury 'as profits', but to be treated as one of a mass of facts that throws light upon the value of the use of the rights taken from Upson."[43]

And where the plaintiff was excluded from the use of his mine, he was not allowed to recover prospective profits, but to show simply the amount of his actual loss, that is, what the use of the premises was reasonably worth. However, the fact that before and after the period in question "the mine was productive and profitable", was taken as showing with sufficient certainty a definite loss of profits by the plaintiff.[44] But in other cases the profits of mining have been held too uncertain to be recovered as a measure of damages.[45]

(c) Internal risk profits on capital. The legal principle which permits the courts to allow compensation for damages applies as a matter of course to all capital which has been incorporated in a thoroughly established business. The entrepreneur is entitled as might be expected, to the use value of the instruments of produc-

[39]Mill River Woolen Mfg. Co. *vs.* Smith (1867) 34 Conn. 462; Howe *vs.* Andrews (1892) 62 Conn. 400; 26 Atl. 394.

[40]Geer *vs.* Rockwell (1895) 65 Conn. 323; 32 Atl. 924.

[41]White *vs.* Moseley (1829) 25 Mass. 356.

[42]Pollitt *vs.* Long (1870) 58 Barb. 20, 34; Woodin *vs.* Wentworth (1885) 57 Mich. 278; 23 N. W. 813.

[43]Newark Coal Co. *vs.* Upson (1883) 40 Oh. St. 17, 26.

[44]Moffatt *vs.* Fisher (1877) 47 Iowa 473.

[45]Coosaw Mining Co. *vs.* Carolina Mining Co. (C. C. 1896) 75 Fed. 860; McCornick vs. United States Mining Co. (C. C. A. 1911) 185 Fed. 748.

tion both in manufacturing and in trade and commerce. But the measure of damages here seems to be more complicated than in the case of land. The standard of compensation may refer to a single unit of capital, a group of related factors, or to an entire business. If the injury complained of affects an entire enterprise, its use value is usually taken as the criterion of damages. Still the money profits of an enterprise are often fixed and certain, and they may then be taken as the final standard of this use value, but much less frequently in trade and commerce than in manufacturing. We may take first the simple application of this principle in the milling industry. In one instance the erection of a mill was wrongfully delayed. The prospective rent of the completed mill was taken as the measure of its value in use; but the court refused to consider future profits as the standard of compensation.[46] Nor in the case of failure to erect a mill on a certain person's land could the latter recover as damages the profits from the proposed business.[47] But where a person had agreed to repair a long-established mill and had failed to keep his contract, the miller was able to recover the money profit that he would have made by sawing the logs already secured for manufacture into lumber.[48]

Certain it is, that the circumstances under which this rule is applied in manufacturing afford a wide field of investigation for the economist. Within this range of subjects, we may note that damages were obtained by injured persons for the destruction of the stock, of a green house,[49] for failure to keep buildings in repair,[50] for injury caused by supplying poisonous coloring matter to an ice cream factory,[51] for interrupting a fibre mill by raising the water of a stream,[52] and for disabling an engine necessary to carry on a certain business.[53] This rule applies, of course, where the profit-

[46]Abbott *vs.* Gatch (1858) 13 Md. 314.

[47]Jones *vs.* Nathrop (1883) 7 Colo. 1; 1 Pac. 435.

[48]Hinckley *vs.* Beckwith (1860) 13 Wis. 34; *contra* see Martin *vs.* Deetz (1894) 102 Cal. 55; 36 Pac. 368.

[49]Laufer *vs.* Boynton Furnace Co. (1895) 84 Hun 311; 32 N. Y. Sup. 362.

[50]Raynor *vs.* Valentin Blatz Brewing Co. (1898) 100 Wis. 414; 76 N. W. 343.

[51]Swain *vs.* Schieffelin (1890) 58 Hun 608; 12 N. Y. Supp. 155.

[52]Fibre Co. *vs.* Electric Co. (1901) 95 Me. 318; 49 Atl. 1095.

[53]Wolff Shirt Co. *vs.* Frankenthal (1902) 96 Mo. App. 307; 70 S. W. 378.

able use of premises is prevented by a failure to supply necessary machinery or power.[54] When the operation of a mill was delayed because a steam engine was not furnished according to contract, the loss of the use of the mill was held to be properly included in damages.[55] In a unique case the plaintiff intended to use a machine ordered by him for a peculiar and novel purpose. He accordingly presented a claim for damages commensurate with the large profits which he expected from the intended use. But the court held, on the contrary, that the measure of damages was the value of the use of the machine for the ordinary purpose for which it was constructed. Clearly enough the plaintiff could not claim profits upon experiment, but strange to say he was allowed such gains from a use to which the instrument was not devoted.[56]

It is to be observed, however, that this rule is somewhat modified in its application to newly established industries. If the entrepreneur embarks upon a new business venture, he can recover nothing as damages from his expected profits. His profits are very uncertain, and, as one court has said, there may be either a profit or a loss. The enterprise has not yet proved its worth; and actions for damages are confined to a consideration of the actual use value of the enterprise.[57] Moreover, it may be added that this rule also applies strictly to those parts of an established enterprise, which are intended to serve wholly a new use.[58]

Even the use value of single capital units is rejected in making up the measure of damages, if by some means they are wholly destroyed. That is to say, actions brought for the entire destruction of profits do not involve any question of "gains prevented"; for the law assumes that the plaintiff's interest in the destroyed property ceased and was replaced by the right to secure its value in money. To be more explicit, the owner of a machine may obtain

[54]W. P. Callahan & Co. *vs.* Chickasha Cotton Oil Co. (1906) 17 Okla. 544; 87 Pac. 331.

[55]Freeman *vs.* Clute (1847) 3 Barb. 424; Davis *vs.* Talcott (1853) 14 Barb. 611, 628.

[56]Cory *vs.* Thames Iron Works Co. (1868) L. R. 3 Q. B. 181, 17 L. T. R. (N. S.) 495.

[57]Central Coal Co. *vs.* Hartman (C. C. A. 1901) 111 Fed. 96; Red *vs.* Augusta (1857) 25 Ga. 386; Kenny *vs.* Collier (1887) 79 Ga. 743; Green *vs.* Williams (1867) 45 Ill. 206; Hair *vs.* Barnes (1887) 26 Ill. App. 580; States *vs.* Durkin (1902) 65 Kan. 101; 68 Pac. 1091; First Nat. Bank *vs.* Carroll (1907) 35 Mont. 302; 88 Pac. 1012.

[58]Red *vs.* Augusta, *supra*; Kenny *vs.* Collier, *supra*; Coweta Falls Mfg. Co. *vs.* Rogers (1856) 19 Ga. 416; Crabbs *vs.* Koontz (1888) 69 Md. 59; 13 Atl. 591.

damages for delay or partial destruction because of his loss of the use of it;[59] but if it is wholly destroyed, he is allowed to receive the entire value of the machine; but no compensation except interest is given for the time during which he is deprived of its services. He is no longer able to claim that he might make a future gain by means of it, and his recovery is, therefore, limited to the value of the property at the time of its destruction.[60] This is true both of natural agents and capital.

The most perplexing problems in the application of this rule occur, needless to say, in the cases which involve transactions in trade and commerce. Without doubt the courts attempt to carry out where possible, the age-long principle of basing damages upon use value; but the conditions under which it is applied make the rule necessarily somewhat flexible. A court in Minnesota has even declared that cases rarely occur in which profits in a mercantile business are sufficiently certain to be used as the basis of a rule of damages.[61] But this opinion is, perhaps, too radical, for at all events it does not seem to agree with the trend of the most recent opinions. In a number of such cases, at least, the courts have accepted money profits as the final standard of compensation. In a particular instance, a plaintiff, while engaged in the messenger business, had rented a telephone which he expected to use for a year. The instrument was, however, taken out so that he lost the use of it for nine months. Although the business had been carried on only a short time, the evidence showed that it was increasing; and the jury was, therefore, instructed to assume that the increase would continue. Despite the fact that profits were not absolutely certain, the court was of the opinion that such prospective returns had been under consideration when the contract was made. It was, therefore, held that the plaintiff might recover for his loss of profits during the remainder of the contract period.[62] Further, in a Massachusetts case the injured person was allowed to show that during the time he was furnished with trading stamps by the defendant, his business had perceptibly increased, and that when they were no longer

[59]Thomas B. & W. Mfg. Co. *vs.* Wabash, *etc.* Ry. (1885) 62 Wis. 642; 22 N. W. 827; See Edwards *vs.* Beebe (1865) 48 Barb. 106.

[60]This is true both of natural agents and capital. McKnight *vs.* Ratcliff (1863) 44 Pa. 156, 169; Erie C. I. W. *vs.* Barber (1884) 106 Pa. 125, 135.

[61]Casper *vs.* Klippen (1895) 61 Minn. 353; 63 N. W. 737.

[62]Owensboro Telephone Co. *vs.* Wisdom (1901) 23 Ky. Law Rep. 97.

supplied, it showed a sudden decline.[63] The Supreme Court of Michigan has decided that in cases of this sort the measure of damages is, not the expected profits, but the average value of the use of the property employed. To ascertain this use value, evidence has been admitted of the actual existence of past profits.[64]

Finally, in the field of trade[65] and commerce we are deeply interested in two classes of cases which serve to compel the seller to co-operate with the purchaser of an economic good if the latter is used in carrying on a productive process. In the first class of cases, there is an implied agreement from the circumstances under which the sale is made that a commodity furnished by the seller shall not prove defective or unsound. In the second class of decisions, he simply fails to deliver the goods at the time prescribed in his contract. This act may, of course, work a definite injury to the purchaser, and the court will generally order a performance of the contract, or award him damages according to his injury.

In the first group of cases, the seller becomes responsible by an implied contract for the quality of the good which he furnishes. We shall examine a few cases by which this right is sustained. In early cases under the civil law, there is an implied warranty on the part of the seller that he possessed a valid title to the goods which he offered, and that they were not defective. But under the common law there is a clear distinction between the warranty covering the title and that relating to the quality or use value of a good. The title was warranted under the common law; but if the purchaser had opportunity to examine the good, the seller

[63]Gagnon *vs.* Sperry & Hutchinson Co. (1910) 206 Mass. 547, 555; 92 N. E. 761.

[64]John Hutchinson Mfg. Co. *vs.* Pinch (1892) 91 Mich. 156, 160; 51 N. W. 930. On the other hand, where a river boat in New York lost a trip on account of a collision with another vessel, it was held that the profits were too speculative to be recovered. Hunt *vs.* Hoboken Land Imp. Co. (1854) 3 E. D. Smith (N. Y.) 144. This opinion is, of course, based upon the evidence of a particular case. It is to be observed, however, that the ruling, as such, is hardly in harmony with the decisions of other states.

[65]Suits for damages in the field of trade are numerous. Actions have been successfully maintained for interference with an established jewelry business after the entrepreneur was evicted by the landlord Allison *vs.* Chandler (1863) 11 Mich. 542; for interrupting in like manner the business of a broker, Kitchen Bros. Hotel Co. *v.* Philkin (1902) 96 N. W. 487, for ejecting a tenant from premises which he had used as a skating rink, Standard Amusement and Mfg. Co. *vs.* Champion (1909) 76 N. J. L. 771; 72 Atl. 92, and for guaranteeing that a railroad would enter the town in which an enterpriser was induced to set up in business, Arkansas Valley Town & Land Co. *vs.* Lincoln (1895) 56 Kan. 145; 42 Pac. 706.

was not held responsible for its quality. As American courts have followed the common law principle, the purchaser is required to examine such commodities, and to take them at his own risk in so far as he can rely upon his own observation and judgment. But it is to be noted that, as an important exception to the rule, an *implied* warranty may arise from the circumstances under which a sale is made. This exception is, at this point, of great economic significance.[66]

In a leading case upon this subject[67] it was said that the damage recoverable for a breach of contract might be considered as arising naturally in the usual course of things from the failure to keep it. And it was stated explicitly that when the special circumstances under which a contract is made are communicated to each party, damages may be recovered according to the injury which would ordinarily follow from a breach of it. Thus in the English case of *Curtis* v. *Hannay*,[68] Lord Elden declared that if a person purchase a horse which, though warranted, turns out to be unsound at the time of the sale, the buyer might keep it, if he pleased, and recover the difference between the value of a sound horse and that of the defective one sold to him. By virtue of this rule courts now allow the purchaser to collect damages arising from the loss of an intended use or a profitable sale of an article, provided these facts were communicated to the seller at the time the contract was made. In *Josling* v. *Kingsford*[69] the purchaser was permitted to recover damages upon a contract for the sale of oxalic acid. Upon investigation the court found that the liquid delivered in this instance did not come within the description of that chemical. In another English case,[70] a commodity, which was sold under the name of "scarlet cuttings" and intended primarily for the trade with China, was found to be scarlet cloth of another kind. Lord Ellenborough

[66]Mr. Justice Story has explained this rule as it applies to personal property: "the purchaser buys at his own risk,—*caveat emptor*,—unless the seller either give an express warranty; or, unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold; or, unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale." Story, Sales, (4th ed.) 401; See Barnard *vs.* Kellogg (1870) 77 U. S. 383; Gaylord Mfg. Co. *vs.* Allen (1873) 53 N. Y. 515; Porter *vs.* Bright (1876) 82 Pa. 441; Mixer *vs.* Coburn (1846) 52 Mass. 559; Dean *vs.* Morey (1871) 33 Iowa 120; Roseman *vs.* Canovan (1872) 43 Cal. 110; Armstrong *vs.* Bufford (1874) 51 Ala. 410.

[67]Hadley *vs.* Baxendale (1854) 9 Exch. 341.

[68](1800) 3 Esp. 82.

[69](1863) 13 C. B. (N. S.) 447; 7 L. T. R. (N. S.) 790.

[70]Bridge *vs.* Wain (1816) 1 Stark 504.

charged the jury to the effect that if the cloth was sold under the name of "scarlet cuttings" in the invoice, the plaintiff was entitled to recover the profits which he would have made in the China market had the cloth been what it was supposed to be. If this commodity was a staple with a definite price, it is plain that profits here were easily ascertained.[71]

The second class of cases refers to a breach of contract on the part of the seller who has agreed to deliver a commodity at a certain time and place. If the purchaser needed this commodity in a particular enterprise, the productive process may have been seriously interrupted, and perceptible risk-losses may have been sustained. Indeed, unless he could have secured immediately another commodity of the same kind and quantity, his utility profits would at least have been placed in jeopardy. True, the courts do not think in terms of utility profits, but they have, nevertheless, realized that if he is deprived of a concrete good he suffers a distinct loss of its *use value* to himself. They have, therefore, constructed a rule of damages which will ultimately restore to him the commodity for which he had bargained. This is done in two ways. If his loss cannot be estimated in terms of money, courts will probably compel the seller to perform the established contract. But in the usual case, the purchaser may collect the difference between the stipulated price and the market value of the commodity at the time it should have been delivered. By using proper foresight, then, at the termination of the contract he may purchase the desired good in the open market and thus escape the threatened interruption to his business and the corresponding risk loss. By this method the courts here relieved the plaintiff of all risk loss in securing the concrete good and his proper utility profits.[72]

V. In passing to the subject of external risk profits we have, as

[71]In the suit of Allan *vs.* Lake (1852) 18 Q. B. 560, the defendant sold a crop of growing turnips under the description of Skirving's Sweedes, but when they had matured, it was found that the seed used in planting them was of another sort. The seller of the seed was then sued for damages. It was held that the statement that the seeds were of a definite variety was a particular description of a known article of trade, which amounted to a warranty; and the plaintiff was, therefore, allowed to collect damages.

[72]Many cases could be cited which uphold this principle of law, but they are reserved to illustrate, in another place, the presence of a scarcity surplus that may accrue to a mere speculator, who would simply have resold the commodity in the open market. It is obvious that by this ruling, the damages for breach of contract, secured by a trader or speculator, amount in reality to a pure value increment.

will be seen, crossed the line which separates such returns from internal risk gains. As we have previously observed the contrast is plain. Internal risk profits arise solely from improvements in the concrete productive process, that is, by reducing the losses on the entrepreneur's expenditures and on the final product. External risk profits, on the other hand, relate solely to exchange values as distinct from values in use; and are made permanent by any economic or legal means which will prevent fluctuations in exchange value. When the profits of an enterprise have become so fixed and certain that a court is willing to make them an ultimate measure of damages, risks have become so scientifically reduced that the entrepreneur is probably receiving the full money value for his utility profits. It is, therefore, clear that when external risk profits become firmly established, the other forms of efficiency returns also become reasonably certain. In other words, in the four groups of cases which are to be examined here, we have entered into the problem of exchange value; and considerable difficulty is found in separating this form of risk profit from pure scarcity surpluses. Obviously, where active competition does not exist, prices will tend to rise above the point necessary to prevent external risk losses; and the presence of scarcity surpluses will tend to conceal efficiency profits.

(a) In the first group of cases the purchaser has agreed to take a certain commodity from the entrepreneur at a fixed price, but fails subsequently to keep his contract. Fear of certain loss often impels a person to break his agreement, and it is patent that he thus injures the producer, who must take the risk of disposing of his product to another person. As the commodity is assumed to be still physically perfect, any loss would necessarily arise from a decrease in exchange value. A familiar instance may be selected in which the entrepreneur has agreed to supply building materials to a second person. By breaking his contract the purchaser in this case is liable in damages for the loss which has fallen upon the entrepreneur; for the latter is entitled to the full value of his product. In particular instances the entrepreneur may not have gone to the full expense of performing his part of the contract; but he is, nevertheless, entitled to all prospective profits which he would have made by fulfilling the agreement. It will be noted that, if he has been put to but slight expense, his profits consist almost entirely of a pure value surplus. Cases which adequately

illustrate this point have, therefore, been reserved for another place to explain one form of the scarcity profit.

(b) The second class of cases also involve a contractual surplus. The usual contract is made between the buyer and seller of a commodity, but the latter is unable to keep his agreement because of an injury by some third person to the productive process or to the final product. As his profits are fixed and certain by the terms of the contract, the courts are inclined, in more recent decisions, to allow as damages the profits which he would have made if he had not suffered the injury. We may note here that in a decision of 1858, the court refused to permit the value of certain orders for the picture of Henry Clay to be taken as the measure of damages.[73] But it is hardly necessary to state that this decision is not in harmony with the more advanced legal opinions. In fact, a manufacturer of patented machines in North Carolina was allowed to recover the prospective profits on all orders which he had actually received for these instruments. But he was given no additional amount for future profits; and the conservative character of the decision is seen in the fact that the court refused to consider the returns of the previous year as a measure of compensation.[74] On this same point, the courts of New York have also seen fit to include in the measure of injury the profits which a plaintiff had lost on orders actually received.[75] Obviously, the courts cannot ignore the fact that this form of contractual profit, barring the injury complained of, is wholly the result of past sales and fully as definite as the returns of credit accounts of any past year. Moreover, if the contracts are made under freely competitive conditions, scarcity increments will be at a minimum.

(c) A third division of this group of cases includes only those contracts which are made between the buyer and seller of a business. It is customary for the seller of an enterprise to agree that he will not, within a certain period, enter into competition with the purchaser. The object of this agreement is to give the purchaser, as far as possible, the goodwill of the business. But in the cases under consideration, the seller had broken his contract; and the large number of opinions rendered here covers a great variety of circumstances. For example, the seller is often subject to a

[73]Bennett *vs.* Drew (1858) 3 Bosw. 356.

[74]Jones *vs.* Call (1887) 96 N. C. 337; 2 S. E. 647; See Oldham *vs.* Kerchner (1878) 79 N. C. 106; Lewis *vs.* Rountree (1878) 79 N. C. 122.

[75]Capel *vs.* Lyons (1898) 3 Misc. 73; 22 N. Y. Supp. 378.

definite penalty if he breaks his contract, and this sum is usually more than sufficient to cover losses from his illegal competition.[77] At the same time, if these contracts do not seriously lessen competition, scarcity profits are, of course, largely eliminated. But under this form of contract trade is often restrained, and both efficiency and scarcity profits are frequently accumulated. True, it is to be observed here that the courts often decline to enforce contracts in restraint of trade, provided competition is thoroughly eliminated, or that the restraint is plainly prejudicial to public interests. Profits cannot be recovered, then, if it is discovered that such contracts are in illegal restraint of trade.

(d) In the fourth class of cases external causes exert a marked influence upon the value of a commodity. Many methods of maintaining exchange values exist besides that of a predetermined contractual price. Not the least effective means appears in the form of a tacit understanding between dealers to regulate the sale of commodities. Another method is seen in the conscious effort of trade unions to prevent the decrease of wages. When either of these persistent combinations push prices above the marginal cost of production, a scarcity and, perhaps, a monopoly profit may be realized. On the other hand, of a somewhat different nature is the form of contract by which competitors are, without the purchase of goodwill as in previous cases, prevented from injuring one's business. Thus in the sale or lease of land, it is permissible to exclude persons from entering into competition with a prescribed business. For example, one may be forbidden to sell sand from a tract of land, or coal from a certain dock. Or again a competitor may be restrained from erecting a mill[78] or a hotel on a particular piece of land.[79] This form of contract has often been violated, and one federal court has decided that the plaintiff might recover compensation for the profits which his business actually fell short of what he might have made, if no competition had resulted from the acts of the defendant.[80]

Of an entirely different character is the group of cases in which demand for a commodity is increased by improvements

[77]Oregon Steam Nav. Co. *vs.* Windsor (1873) 87 U. S. 65; American Strawboard Co. *vs.* Haldeman Paper Co. (1897) 83 Fed. 619; Hubbard *vs.* Miller (1873) 27 Mich. 15; Roeber *vs.* Diamond Match Co., (1887) 106 N. Y. 473, 13 N. E. 419.

[78]Norman *vs.* Wells (1837) 17 Wend. 136.

[79]Stines *vs.* Dorman (1874) 25 Ohio St. 580.

[80]Hitchcock *vs.* Anthony (1897) 83 Fed. 779.

wholly outside one's business. The erection of a factory or a university in a city brings to it new enterprises and consequently an increase in trade. So one may create new opportunities for sales by stipulating in a contract that a store shall be erected on a definite site; and in a particular instance a scarcity profit of four dollars an acre was collected as damages.[81] In this connection one, who had been induced to move his business to a certain town by the false statement that a railroad was about to be constructed to it, was given damages in proportion to his profits before the removal.[82] In cases of this kind, however, the rule of damages is generally based on the estimated increase in value which would have resulted from the improvement of the factor. Thus the measure of compensation is, not the anticipated profits of a business, but the difference in value of the plaintiff's property, as it would have been with the contemplated improvements, and as it exists without them.[83] But at this point the entrepreneur's efforts to resist market losses and to increase the value of his property not infrequently result in a scarcity contractual surplus.

Finally, it is apparent that among the "gains prevented" are to be counted the losses from wrongful injury to property and from breach of contract. These are risk losses. But when a remedy exists these losses may be turned by court decisions into external risk profits and restored as damages to the entrepreneur. If the productive process here remains unimpaired, while the injury arises entirely from loss of value, the court has restored simply the external risk profits. These compensate the entrepreneur for the utility which he has created. True, a scarcity surplus may accumulate at times; this is seen particularly in connection with natural agents. The sphere of external risk profits borders, then, on the competitive line of demarcation between the earned increment and the fluctuating scarcity gains which the courts do not recognize as a proper basis of damages. With the conclusion of this description of external risk profits in the industrial world, the task set apart for this article has been finally completed.

The importance of efficiency profits in law cannot be over emphasized, and in presenting this plan of classification, two fundamental conditions are always borne in mind. First, it is assumed here that the entrepreneur's residual surplus in the particular

[81]Iowa Land Co. *vs.* Conner (1907) 136 Iowa 674, 112 N. W. 820.

[82]Arkansas etc. Co *vs.* Lincoln (1895) 56 Kan. 145, 42 Pac. 706.

[83]Ironton Land Co. *vs.* Butchart (1898) 73 Minn. 39, 75 N. W. 749; Smith *vs.* Los Angeles *etc.* Ry. (1893) 98 Cal. 210, 217, 33 Pac. 53.

cases examined has arisen under freely competitive conditions. The accumulation of speculative profits over a long period of time will then be neutralized to a large extent by corresponding losses. Moreover, even the contractual surpluses considered here have been determined by competition and under normal conditions will not greatly exceed the profits of efficiency. Second, the decisions of the courts reject in a most positive manner any effort to include indefinite or uncertain profits within the measure of damages. Such opinions naturally tend to eliminate speculative profits from the rule of compensation. Even remote profits are rejected by American courts. That there may be absolutely no exception, theoretically, to this presentation of efficiency profits, the legal rule of compensation has been traced carefully in relation to all forms of efficiency returns. This plan of profit analysis has, therefore, been applied to concrete industrial conditions in which the opinions of our courts are uniformly consistent.

Yet this group of cases embraces a large industrial field and several essential facts may be emphasized:

I. At present profits are accepted as reliable in most agricultural pursuits. Also, the returns upon fishing, dairying, cattle raising, ice-cutting, wood-cutting, peddling, real estate business, and some forms of mining are found to be sufficiently certain to serve as a basis of damages. In other words, the evolution of law is gradually including more and more within the rule of compensation the profits of manufacturing and commerce.

II. The earnings of the entrepreneur in the form of wages of management have from the earliest times been included in the compensation allowed him for personal injury. And while certain states are uniformly consistent in excluding in this instance gains on capital as a measure of damages, there is, nevertheless, a gradual breaking up of this policy in other sections and an extension of the rule to the profits of an entire business.

III. Many devices are used to overcome market risks and reduce losses. In conserving efficiency profits, the entrepreneur often restricts trade; and in maintaining the individual right of contract, the courts include unearned and scarcity profits in the measure of damages. Especially has the use of contracts in maintaining prices brought about a change in court decisions, for such values become fixed and certain. Needless to say, this evolution is most pertinent to a proper analysis of profits. It has allowed

a gradual legalizing of unearned scarcity surpluses obtained wholly by contractual restraint of trade.

IV. During certain periods abnormal profits greatly increase the amount of investments. At this time unearned surpluses instead of the returns of efficiency dominate the struggle for profit and the presence of scarcity gains may obscure the plan of analysis followed in this discussion. Indeed, the constantly increasing incomes of this nature afford a wide field for investigation, and only eternal vigilance on the part of courts and legislators will prevent the unnecessary growth of this increment.

V. Finally, as the economic sphere of the individual in law has grown constantly broader, his legal correlation of supply to consumption has become more fixed; he has been able to restrain competition, exploit demand, and not infrequently monopoly has resulted. In this fact there lies an ever growing danger, for the competitive plane, which has long controlled the determination of legal profits, is gradually losing its significance in the common law. To be sure our courts still retain the age-long competitive principle. But the evolution of individual rights has forced upon us closer economic relations and compelled us to observe certain rules of cooperation which are steadily welding the American people into a more compact industrial union. In fine, this steady socialization of legal principles has not seldom rendered ineffective the competitive plane and borne with great severity upon both producer and consumer. It is therefore essential to give heed to leading decisions which greatly influence the cooperative accumulation of both efficiency and scarcity profits; and by drawing again the competitive line of demarcation between the earned and the unearned residual surpluses of the entrepreneur, it may be possible to place a check upon persistent forms of industrial and legal evolution which constitute a serious menace to our social and economic well being.

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